STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
Two Gateway Center
Newark, N.J. 07162

IN THE MATTER OF	)	ELECTRIC/LEGAL
THE CONSIDERATION	)	ORDER REGARDING
AND DETERMINATION	)	MOTION FOR
OF COGENERATION	)	RECONSIDERATION
AND SMALL POWER	)	OF DENIAL OF
PRODUCTION STANDARDS	)	GRANDFATHER
PURSUANT TO THE	)	STATUS
PUBLIC UTILITY	)	
REGULATORY POLICIES	)	BPU Docket No.
ACT OF 1978	)	8010-687B

Carella, Byrne, Bain & Gilfillan, by Arthur T. Vanderbilt, III, Esq., Roseland, New Jersey, and Huber Lawrence and Abell, by Blossom A. Peretz, Esq., New York, New York, for Enserch Development Corporation and Turner Power Corporation

Kirsten, Simon, Friedman, Allen, Cherin & Linken, by John K. Enright, Esq., Newark, New Jersey, for Jersey Central Power & Light Company

BY THE BOARD:

On September 28, 1988, this Board issued two orders in Document No. 8010-687B. The first order adopted a Stipulation of Settlement which set forth a revised set of procedures under which New Jersey investor owned electric utilities would select and purchase electric capacity and

energy from qualified cogeneration and small power production facilities, independent power producers and large scale conservation projects. Said stipulation provided at page 10:

> In addition, the provisions of this Settlement Agreement shall not be applicable to proposed APP capacity which may, as determined on a case by case basis, be grandfathered and subject to Board policies and procedures regarding cogeneration and small power production in effect prior to the effective date of this agreement.

The second order issued on September 28, 1988, in turn, designated a number of projects to be grandfathered. In reviewing projects that were in development but were without power purchase agreements, the Board considered the following criteria in determining whether grandfathered status should be granted: (1) whether ratepayers would be better off if a particular project was grandfathered, i.e., whether the grandfathering of that project was in the public interest; (2) whether negotiations between a project and a utility have resulted in a firm pricing agreement; and (3) the effect that grandfathering would have on the development of the project.

On October 12, 1988, Ebasco Services, Inc. (Ebasco) filed a Motion for Reconsideration requested modification of the Board's September 28, 1988 order by grandfathering the cogeneration project being jointly developed by Enserch Development Corporation (Enserch), an affiliate of Ebasco, and Turner Power Corporation (Turner) at the Nestle Foods Corporation (Nestle) plant in Freehold, New Jersey (the Freehold Project).[1] This project contemplates a 100 megawatt cogeneration facility to serve the electric and

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1 For purposes of discussion, the name "Enserch" will be used to identify the movants in this matter.

thermal needs of Nestle with any excess electrical energy and capacity produced by the facility to be sold to Jersey Central Power & Light Company (JCP&L).

By letter dated November 30, 1988, the Board was advised that Enserch had changed counsel and was requested to "defer action on the Motion for Reconsideration for several weeks to afford (counsel for Enserch) the opportunity to review the filing in this matter and determine if it should be supplemented or amended."

Under cover letter dated January 27, 1989, Enserch filed a Supplemental Motion for Reconsideration for the stated purpose of providing the Board ". . . with complete information regarding the history of the Freehold Project, which had not been included in the Motion filed on October 12, 1988, in order to assist the Board in its analysis regarding grandfathering the Freehold Project, so as to demonstrate to the Board that the Freehold Project meets the criteria for grandfathering." JCP&L has opposed the relief requested by Enserch essentially for the reason that, in the opinion of the utility, no firm pricing agreement had been reached between the parties. In addition, Enserch filed a motion dated May 4, 1989, in which it requested the Board to compel JCP&L to continue negotiations in this matter.

Subsequent to the filing of the Supplemental Motion for Reconsideration, the parties have held several meetings which were attended by Board staff and have submitted additional information with the Board.

In its initial moving papers, Enserch argued that the Board had erred by: (1) failing to provide a "reasoned explanation" for the selection of the grandfathering criteria; (2) selecting "patently unsatisfactory" grandfathering criteria; (3) failing to provide a reasoned explanation for its selection of grandfathered qualifying facilities; and (4) failing to

grandfather the Freehold Project based upon the selected criteria set forth in the Board's Order. Enserch further argued that as the September 28, 1988 Decision and Order constituted either a final decision in a contested case or the culmination of a rulemaking proceeding, the Board erred by failing to comply with the procedures set forth in the New Jersey Administrative Procedures Act. N.J.S.A. 52:14B-1 et seq. While we believe that our decision herein renders these arguments moot, we pause briefly to respond thereto.

As indicated hereinabove, the Stipulation of Settlement provided that the Board would determine, on a case by case basis, which projects, if any, would be grandfathered and, therefore, be subject to the Board policies and procedures theretofore in effect. We believe that the criteria set out by the Board are fair and practical based upon the history of and the circumstances surrounding this proceeding and the affected projects. These criteria reflect the Board's central statutory responsibility to ensure that the ratepayers receive safe, adequate and proper service at just and reasonable rates, and the Board's strong policy concern, as well as its obligations under PURPA and the pertinent regulations promulgated thereunder (e.g., 18 C.F.R. 292.401), to encourage cogeneration. It was the considered opinion of the Board that the status of these projects specifically set out in the Board's Decision and Order of September 28, 1988, and the attending benefit to the public interest inherent there: as sources of reliable and economical electric power, warranted those projects being grandfathered without the need for further review or the submission of addition information. This determination, however, did not prejudice or preclude the opportunity of any other developer, including Enserch, to request through a formal filing, that the Board find that its project should similarly be grandfathered.

The Board would note that the adoption of the grandfathering criteria was in direct correlation to the

adoption of the Stipulation of Settlement. Therefore, the Board considers the arguments of Enserch which pertain to alleged violations of the Administrative Procedure Act to be similar to those previously made in a Motion for a Stay and for Reconsideration of the Board's Decision and Order Adopting the Stipulation of Settlement filed by the Clean Coal Developers. In its Order denying said Motion issued on October 19, 1988, the Board stated, in pertinent part:

> There can be no doubt that the record in the Board's consideration of cogeneration and small power production is extensive. This proceeding was initiated in October 1980, and lengthy hearings were held at the Board wherein a full record was developed.
>
> The culmination of this effort was a Board Decision and Order issued on October 14, 1981, wherein procedures and policies affecting the development of cogeneration and small power production in New Jersey were established. The Board further directed that within five years therefrom, a review of cogeneration and small power production would be commenced. Said review was initiated in a timely manner and additional hearings were held before the Board on September 9 and 11, 1987.
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> It is clear, therefore, that the consideration of cogeneration and small power production policies in New Jersey is and has been a formal ongoing proceeding before the Board under one caption and one docket number. In addition, the consideration of those policies set out in the Decision and Order of October 14, 1981 was necessary in order for the board to ultimately rule on the appropriateness and reasonableness

of modification affecting the development of cogeneration and small power production in New Jersey.

Therefore, for substantially the same reasons that we rejected the arguments of the Clean Coal Developers, the Board rejects the claim of Enserch that the Board erred in promulgating its criteria for determining which projects are to be grandfathered.

With respect to the application for reconsideration which is now before us, and based upon our review and consideration of all submissions in this matter, it is the opinion of the Board that the development of the Freehold Project could potentially provide long term benefits to the ratepayers of JCP&L. This project could provide JCP&L with an efficient source of energy and capacity that may offset or delay the need for the utility to build additional generation or transmission facilities. Such results would assist JCP&L by allowing it to continue to provide safe, adequate and proper service to its ratepayers in an area that has experienced substantial load growth in the recent past. The Board is of the further opinion that grandfathering, as opposed to the bidding process now in place, appears to be consistent with the timely development of the Freehold Project.

It is the further opinion of the Board that while negotiations had not resulted in a firm pricing agreement, the submissions before us indicate that the parties had reached a pricing agreement in principle, and despite some uncertainties therein, we believe that understanding to be sufficient base upon which to support a determination that grandfathered status should be approved.

As stated in our September 28, 1988 order and restated hereinabove, applications from cogeneration and

small power production projects seeking grandfathered status will be reviewed and considered on a case by case basis taking into account the specific facts presented therein. The Board's final decision must balance the ratepayers' interest in receiving safe, adequate and proper service with their interest in the setting of just and reasonable rates for that service.

After full review and consideration, the Board finds that the facts specific to this matter warrant the approval of grandfathered status to the Freehold Project. In taking into account the interests of the parties and the ratepayers and in recognizing the uncertainties in the pricing agreement, the Board also finds that any pricing arrangement and results from further negotiations will be assessed against the current level of JCP&L's forecast of its avoided cost as delineated in its Request for Proposals, which was approved by the Board on May 10, 1989. We believe that such treatment will result in a fair level of costs to be borne by the ratepayers while permitting an opportunity for the timely development of the project and the realization of project benefits to the ratepayers. This pricing approach is consistent with the Board policy in effect prior to the adoption of the Stipulation of Settlement regarding the appropriate payments to be made to those projects that wished to receive the benefits which are inherent in a levelized pricing structure. As indicated hereinabove, the Board recognizes the potential benefits of the Freehold Project, including those related to meeting the capacity needs of JCP&L. In order that these potential benefits may be realized, both parties are encouraged to negotiate to reasonable settlement on the issue of pricing subject to the parameters set out above. The Board will support such negotiations and will be receptive to any resulting agreement that will provide an opportunity for the project to succeed.

Accordingly, the Motion for Reconsideration and the Supplemental Motion for Reconsideration are granted to the

extent that grandfathered status, subject to the terms set out hereinabove, is approved for the Enserch Freehold Project. Based upon the foregoing, the Board considers the motion of Enserch to compel JCP&L to continue negotiations to be moot.

DATED: July 31, 1989 BOARD OF PUBLIC UTILITIES
BY: /s/

CHRISTINE TODD WHITMAN
PRESIDENT

/s/
GEORGE H. BARBOUR
COMMISSIONER

ATTEST:

/s/
KAREN KENNEDY